SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C.19242

STATE OF CONNECTICUT

v.

VICTOR CRESPO

REPLY BRIEF OF THE DEFENDANT-APPELLANT

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The following abbreviations are used throughout this reply:

S.B. : State's Brief

T. : Transcript of trial Proceedings

A. : Appendix to Defendant's Opening Brief

D.B. : Defendant's Opening Brief

This reply brief addresses certain points and claims made by the state in its brief. The defendant continues to claim all the arguments made by him in his main brief. Any failure to address arguments previously made in defendant's main brief should not be construed as a waiver of any of those claims.

ARGUMENT I. THE APPELLATE COURT ERRED WHEN IT DETERMINED THAT THE DEFENDANT'S WRITTEN STATEMENT WAS PROPERLY ADMITTED AT THE TRIAL.

A. The State Crucially Misstates The Time When The Written Statement Was Made.

In regard to the first certified question the defendant takes issue with a number of claims and arguments made by the state in its brief to this Court. These will be addressed below. At the outset, though, the defendant takes issue with what appears as extreme factual misstatements made by the state at page seven of its brief.

The state begins by acknowledging that the defendant was not presented at the first session of the court, January 19, as required by the statute but instead was presented the following day, January 20. The state then maintains that "[t]he record clearly established, however, that the defendant's written statement was made well before the time that the state was required to present him pursuant to § 54-1c." That is untrue. The state further maintains at page seven, without citing to anything, that the defendant signed his written statement at 10:46 a.m. on January 19. That also is untrue. S.B. 7.

According to Detective Ortiz, the defendant needed to be in court at 11:30 a.m. "Defense: And as far as you're concerned, it's their [Booking Department's] responsibility to get him [the defendant] to court by the 11:30 requirement? Ortiz: That's correct ma'am." T. 12/7/10 55. According to Detective Ortiz, he took the defendant from booking, where he was waiting to be transported to the court, at some time after 10 a.m. in order to question

him about the case. Id., 24. In this regard, Detective Ortiz testified that the defendant signed a *Miranda* waiver form at 10:44 a.m. and formal questioning then commenced. Id., 5, 57. Thereafter, Ortiz talked with and questioned Crespo for about ten minutes and Crespo took about another ten minutes to write his statement. Id., 57. In addition to this, Ortiz gave his cell phone to the defendant to use to make some personal calls. "I let him borrow my cell phone…. I think he made a couple of calls." Id., 60-61.

Throughout his testimony, Detective Ortiz indicated that he was, at best, going right to the edge time wise when taking the defendant from booking in order to question him and get a statement from him. After establishing that Detective Ortiz knew that the defendant needed to be taken to court on January 19, Defense Counsel questioned as follows:

> "Defense: Yet you had him with you—
> Ortiz: Yes ma'am
> Defense: interrogating him at the time he was supposed to be arraigned?
> Ortiz: That's correct. I was interviewing him, yes"

Id., 55.

Later, Ortiz maintained only that he "believe[d] it was before 11:30" that he left the defendant off at booking while other testimony from Ortiz indicated that the defendant was supposed to be in court by 11:30 in order to be arraigned on January 19. Id., 55, 58. Just adding together the times as testified to regarding first, the questioning of the defendant, second, the defendant writing his statement and third the defendant making telephone calls, places the return of the defendant to Booking as precariously close to or after 11:30. One thing, though, that is certain is that, whatever time Ortiz returned Crespo to the Booking Department, his return was too late for him to be transported to court that day. The transport had already left, and when the defendant's case was called in court, the

prosecutor erroneously represented that Crespo wasn't in court because he was in the hospital. T. 1/19/10 at 1.

For the state to claim, as it does at page seven of its brief, that the defendant gave his written statement "well before" the state was required to present him is the height of misrepresentation, and is contradicted by Detective Ortiz's own testimony that he was interrogating/interviewing Crespo at the time Crespo was supposed to be arraigned in court. T. 12/7/10 at 55. Not only was the statement not taken "well before" the time Crespo was required to be presented in court, the statement was intentionally taken by Ortiz at the time that Crespo was required to be in court.

Not only did the Bridgeport police knowingly act in violation of the statute, the defendant submits that this intentional violation strikes at the core reason for the enactment of C.G.S. § 54-1c where the legislature unequivocally provided that "any statement…obtained from an accused person who has not been presented to the first session of the court… shall be inadmissible." The clear point that the legislature was making over fifty years ago is that it wanted accused people brought to court as quickly as possible so that there would be limited opportunity to have such individuals subjected to police questioning prior to their presentment. Here the defendant was waiting in Booking to be transported to the first court session after his arrest when Detective Ortiz pulled him out of Booking for the purpose of questioning him and getting a statement from him. To disarm Crespo and to facilitate getting a statement from him, Ortiz allowed Crespo to use his telephone to make personal calls, and promised Crespo that he would make efforts to have arrested the person who had earlier shot and assaulted Crespo. Id., 60-61, 16, A. 85. This was all done when the defendant should have been able to continue to wait in Booking

to be transported, and should have been able to be transported to Court and should have been presented/arraigned in court at the first court session after his arrest. Section 54-1c was enacted to prevent this very type of occurrence so that arrested individuals will be protected from the precise police action that took place here.

B. Inherent Problems Exist When Police Take A Statement And Then Fail to Present the Defendant In Court On The Day After His Arrest.

It is clear that this defendant's statement was taken when he should have been transported to court and when he should have been arraigned by the court. It is equally clear that the statement was not taken "well before" the time the state was required to present the defendant in court pursuant to the statute. S.B., 7. Thus, the defendant maintains that even by the standard adopted by the Appellate Court in *Crespo*, measuring the admissibility of this statement by whether it was made before the first court session and the required time of presentment, the defendant's statement was inadmissible. But, as argued repeatedly by the defendant, this Appellate Court standard does not comport with the plain words of § 54-1c. Further, the defendant here notes, as he did in his main brief, the precariousness of ignoring the plain words of the statute and adopting the Appellate Court standard of measuring statement admissibility by when it was made in relation to when presentment should have taken place. At pages 18-20 of his main brief, the defendant addresses the multitude of difficulties and complexities that are entailed in trying to measure the time of the statement with the time of presentment for someone who was not presented to court at the court's next session. Looking to those difficulties serves to highlight the wisdom of the legislature when it unequivocally provided that all statements made by someone not presented in court at the first session after the arrest are inadmissible.

C. *State* v. *Vollhardt* Clearly And Unequivocally Applies To The *Crespo* Case.

At page 16 of its brief, the State maintains that "[t]he defendant's reliance on *State* v. *Vollhardt*, 157 Conn. 25 (1968), is misplaced and the language that he cites from the opinion simply does not address the issue presented here." Such representation by the state is wrong, and it is difficult to understand how the state makes the claim that it does. Here, in a somewhat expanded version, the defendant cites to the verbatim language of *Vollhardt*. "Section 54-1b provides that any person arrested with or without a warrant... shall be presented 'before the circuit court session next held in the circuit where the offense is alleged to have been committed...." Id., 38. If this language from *Vollhardt* could possibly be considered as not sufficiently precise, the *Vollhardt* Court goes on to hold that "[t]he language of the statutes is clear and unambiguous, and, accordingly their intent is to be determined from the language used.... The purpose of the statutes is to ensure that an accused is presented before the session of the Circuit Court next held, which in this case would be the day following his arrest, at which time he must be advised of his rights before he is put to plea. [citations omitted]. Section 54-1c renders inadmissible any confession received when there has been either a delay in presentment or a failure to warn an accused of his rights pursuant to Section 54-1b." Id., 38-39. It is inconceivable how the state can maintain that *Vollhardt* does not apply here. It clearly does. And *Vollhardt* is not alone. As noted and argued in defendant's main brief at page eight, our Courts have reached similar conclusions in *State* v. *Piorkowski*, 236 Conn. 388 (1996); *State* v. *Darwin*, 155 Conn. 124 (1967) and *State* v. *Cobbs*, 164 Conn. 402 (1973). The defendant therefore continues to maintain that in order to affirm the Appellate Court on this question, this Court of logical necessity must overrule its holding in *Vollhardt*.

D. It Is Impossible And Improper To Determine Legislative Intent Here From Words Not Spoken.

It should go without additional reiteration that the defendant maintains that the provisions of § 54-1c are clear and unambiguous. The state and the Appellate Court, though, disagree. The state at page ten of its brief, when addressing its version of legislative intent, cites to the remarks of two legislators both of whom are supportive of the enactment of the statutory language of what is now § 54-1c. First, referring to the remarks of Representative Satter and then referring to the remarks of Representative McNamara, the state maintains that their passing and non-specific mention of federal standards undoubtedly were references to the holdings in *McNabb* v. *United States*, 318 U.S. 332 (1943) and *Mallory* v. *United States*, 354 U.S. 449 (1957). There is no basis for making this "undoubted" assumption.

In fact, both legislators were instead speaking to the importance of bringing arrestees to court and before a judge as quickly as possible, and neither legislator mentioned or even hinted at the *Mallory* case or the *McNabb* case. In regard to Representative Satter's remarks, his reference to federal standards actually related to a different bill that was before the legislature in 1959 which would have required immediate arraignment after an arrest. 10 H.R. Proc., 1963 Sess., pp. 1730, 1732, A. 77, 79. It is inconceivable that anyone or any court could infer from these remarks that they were knowing and nuanced references to the relatively complex holdings in *Mallory* and *McNabb*. Certainly neither remark can be construed to mean that presentment "to the first session of the court" does not necessarily require presentment "to the first session of the court." General Statutes § 54-1c.

II. THE APPELLATE COURT ERRED WHEN IT HELD THAT THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO CONVICT THE DEFENDANT OF PISTOL WITHOUT A PERMIT PURSUANT TO GENERAL STATUTES § 29-35.

The state contends in its brief on pages 18-23 that from the evidence before the jury it was a reasonable inference that the defendant had carried the gun outside of his dwelling. It claims that testimony that the defendant had received the gun from a guy named "Fats" in the Green Homes housing project, and that he was keeping the gun in exchange for some heroin, was sufficient to allow an inference that the defendant himself carried the weapon to the vehicle. As stated in the Defendant's opening brief, the claimed inference rises only to the level of conjecture and surmise and is impermissible to the ultimate question of whether the defendant physically possessed the weapon outside of his dwelling. See D.B. at 28-33. There is no precedent for allowing such broad conjecture. The defendant has been unable to find any case law that allows a conviction for a violation of this statute, General Statutes 29-35 (a), without some direct testimony or physical evidence that the defendant physically carried a gun.

The state asserts that the defendant's reading of the statute requiring a physical holding of the weapon creates a "safe harbor" for those transporting a weapon in certain circumstances. The state brings up the circumstance where a weapon is transported in a motor vehicle. This is inapposite because this particular conduct is illegal under General Statutes § 29-38, illegal possession of a weapon in a motor vehicle, with which the defendant has been convicted of here. The Court holding the state to the burden of proof as it is clearly stated in the statute would not ultimately make the conduct at issue permissible, because it still falls within an offense which is encompassed under a different statute.

The state erroneously relies on case law asserting that dominion and control are sufficient to prove the element of carrying for § 29-35(a). Citing at pages twenty-one and twenty-two of its brief to *State* v. *Hopes*, 26 Conn. App. 367, 375, cert. denied, 221 Conn. 915 (1992), the state claims that the Appellate Court has interpreted the statute to mean that to prove the weapon was "upon his person" the state need only show dominion and control. The facts in *Hopes*, though, are vastly different from the facts here, because in *Hopes* there was testimony that the witness saw Hopes' companion give Hopes a pistol—thus he was seen to have a pistol on his person. Further, the witness testified to hearing gunshots soon thereafter. Id. 369-70. What specifically was addressed by the Appellate Court in *Hopes* was whether evidence of asportation of the weapon, to wit evidence that the weapon was seen being moved from one place to another, was required for a conviction of carrying a pistol without a permit. The Court's ultimate holding in *Hopes* was that "there does not have to be proof that the defendant physically moved or transported the pistol over space while carrying an unlicensed pistol." Id. 375. *Hopes* holds that proof of asportation is not required for the element of carrying, but it does not hold that dominion and control alone is enough to meet the state's burden. Unlike here, in *Hopes* it was seeing the weapon being given to Hopes and him having that weapon on his person that provided the necessary proof that the crime was committed. Subsequent decisions in Appellate Court cases regarding § 29-35 (a) that have specified that constructive possession is not enough and an actual carrying needs to be proven, demonstrate the correctness and continued vitality of this holding. See *State* v. *L'Minggio*, 71 Conn. App. 656, 672, 803 A.2d 408, cert. denied, 262 Conn. 902, 810 A.2d 270 (2002), *State* v. *Williams*, 59 Conn. App. 603, 608, 757 A.2d 1191, cert. denied, 254 Conn. 946, 762 A.2d

907 (2000). It is finally noteworthy that the instant Appellate Court decision in *Crespo* requiress that the state must prove a defendant "bore a pistol or revolver upon his person . . . while exercising control or dominion of it." *State* v. *Crespo*, 145 Conn. App. 547 (2013).

By saying in its brief that the evidence showed only dominion and control over the weapon, rather than claiming proof of an actual carrying, the state in essence concedes that there was no proof presented at trial of the weapon being carried by the defendant. S.B. 23. The legislature creates elements of each crime it enacts through legislation for a reason. Given that directive, the state must then prove each and every element of the crime beyond a reasonable doubt. Dominion and control does not ultimately prove a carrying, and such proof alone is not sufficient to allow a conviction of § 29-35 (a), carrying a pistol without a permit. The defendant's conviction should not stand on the evidence the state presented.

The defendant relies for the balance of his argument as to both certified questions on the arguments he made in his opening brief.

Respectfully Submitted,
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STATE OF CONNECTICUT SUPREME COURT

v. STATE OF CONNECTICUT

VICTOR CRESPO AUGUST , 2014

CERTIFICATION

Pursuant to Conn. Prac. Bk. §62-7 the undersigned certifies that the attached reply brief was mailed first class postage prepaid this day of August 2014, to: Hon. Eddie Rodriguez, Jr., c/o Chief Clerk, 1061 Main Street, Bridgeport, CT 06604; Leonard C. Boyle, Deputy Chief Assistant State's Attorney, Juris No. 430172, Office of Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Tel. (860) 258-5807, Fax (860) 258-5828.

In addition, the attached reply brief was delivered via Department of Administrative Services Central Mail and Courier Service to the defendant-appellant, Victor Crespo, #175451 MacDougall Walker Correctional Institution, 1153 East Street South, Suffield, CT 06080.

It is also certified that the defendant-appellant's brief complies with all the provisions of Conn. Prac. Bk. §67-2.

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